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Utah v. LaFond : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Respondent,

v.

ROBIN M. LAFOND,

Defendant/Petitioner.

:

:

:

:

Case No. 20010970-CA

:

Priority No. 2 (incarcerated)

REPLY BRIEF OF APPELLANT

This is a direct appeal from a conviction of possession of methamphetamine, a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), entered in the Seventh District Court of Grand County, State of Utah, the Honorable Lyle R. Anderson, Judge, presiding.

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Paulette Stagg
Clerk of the Court

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SUMMARY OF ARGUMENTS

Ms. Lafond maintains all positions as they were originally set forth in her opening brief. She responds to the State's brief as follows.

Under well established law from the United States and Utah Supreme Courts, when an officer demands that a person identify and/or produce the contents of her pocket, the officer conducts a search, not a frisk as the State contends.

In the instant matter, the officer searched Ms. Lafond absent probable cause or exigent circumstances, and in so doing, violated the Fourth Amendment and Article I § 14 of the federal and state constitutions.

The officer's questioning of Lafond also violated the scope of detention.

This Court should reverse the trial court's denial of the motion to suppress and remand this matter to the trial court for withdrawal of the conditional plea.

ARGUMENT

I. SEARCHES AND FRISKS DISTINGUISHED

With regard to whether the officer frisked or searched Ms. Lafond, the State argues in its summary that “all facts point to a frisk.” State’s brief at 7. In its argument, the State focuses on the portion of the officer’s conduct that actually did consist of a frisk, i.e., when he patted down the exterior of Lafond’s pockets, and implicitly argues that if an officer demands that a person identify and produce the contents of their pockets, no search has occurred. State’s brief at 15-17.

While it is true that the officer here patted down Lafond’s pockets at one point (R. 127 at 9), before he did so, he demanded that she tell him what was in her pockets, and that she remove the bags she had placed in her pockets (R. 127 at 9).

Contrary to the State’s argument, these facts do not all point to a frisk, but amount to a search under well established federal constitutional law.

In Terry v. Ohio, 392 U.S. 1 (1968), the Court granted police officers permission to conduct limited pat-downs of the exterior of suspects’ clothing for weapons, and approved of frisks which are confined in their scope to the least intrusive means necessary to protect the police from potentially armed suspects. See id. at 30. The Court expressly distinguished properly limited Terry frisks for weapons from “general exploratory search[es]” for “whatever evidence of criminal activity” might be found. See id.

In this case, where the officer did not initially pat down Ms. Lafond for weapons, but

instead demanded to know what she had put in her pockets, and demanded that she remove the contents of her pockets (R. 127 at 9), the officer exceeded the proper scope of a Terry weapons frisk, and conducted a general exploratory search for whatever evidence might be found. Cf. id. See also Sibron v. New York, 392 U.S. 40, 65-66 (1968);¹ United States v. Santillanes, 848 F.2d 1103, 1109 (10th Cir. 1988).²

While the State would like this Court to believe that there is no authority for the proposition that an officer may not demand to know or see the contents of a suspect's

¹ In Sibron, the Court explained, The search for weapons approved in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in Terry place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

Id.

² In Santillanes, the Tenth Circuit also recognized, Furthermore, the search for weapons should be a limited intrusion. The Supreme Court in Sibron v. New York, 392 U.S. 40, 65, 20 L. Ed. 2d 917, 88 S. Ct. 1889, noted that "the search for weapons approved in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault." In the instant case, the detective went beyond patting appellant's outer clothing. He reached into appellant's pockets where he discovered a beer can and a roll of money. The detective's conduct in this case cannot be considered minimally intrusive. The actions of Detective Haury and the other officer exceeded the scope of a permissible frisk and consequently violated appellant's Fourth Amendment rights.

Id.

pockets under the Terry frisk doctrine, see State’s brief at 15-16 (claiming a lack of authority for Lafond’s “novel” proposition to this effect), page 13 of the State’s brief cites to State v. Whittenback, 621 P.2d 103 (Utah 1980), a Utah case which also recognizes that when an officer asks suspects to empty their pockets, this conduct amounts to a search. In Whittenback, an officer investigating suspected laundromat theft demanded that the suspects empty their pockets. See id. at 106. Having addressed Terry v. Ohio, 392 U.S. 1 (1968), earlier in the opinion, the Whittenback court found that the officer’s conduct in demanding that the suspects empty their pockets constituted a search which was lawful as a search incident to arrest. See id. at 106-107.

The State argues that Lafond did not raise this issue in the trial court, and that the Court may reach the issue only through the plain error doctrine, which requires errors to be both plain and prejudicial before they will be addressed for the first time on appeal. State’s brief at 15, citing State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993).

As a factual matter, at the hearing on the motion to suppress, while defense counsel primarily focused on whether a Terry frisk was justified at all, counsel consistently characterized the officer’s conduct as a search, and argued that the search of Ms. Lafond was unacceptable under Terry and unsupported by probable cause (e.g. R. 128 at 5).

Assuming *arguendo* that defense counsel’s argument was insufficient to otherwise preserve the issue, the preliminary hearing transcript which was the factual basis for the motion to suppress clearly and without contradiction indicates that the officer asked Lafond to identify and remove the contents of her pockets prior to any frisk (R. 127 at 9).

At the time of the hearing and ruling on the motion to suppress, thirty-plus- year- old law clearly recognized that such conduct amounts to a search and is not properly viewed as a frisk. See Terry; Sibron; Santillanes; and Whittenback, supra.

Thus, the trial court plainly erred in failing to recognize that the officer violated the Fourth Amendment and Article I § 14 in demanding that Lafond identify and produce the contents of her pockets, and even if the trial court should not have recognized the error, given its highly prejudicial nature, this Court could and should correct it under the plain error doctrine. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989)(plain error doctrine requires a showing that an obvious and harmful error occurred which prejudiced the defendant's substantial rights, although the obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in hindsight than it likely was before the trial court.).

The State has not argued that the search of Ms. Lafond which occurred when the officer demanded to know and see the contents of her pockets was justified by probable cause or exigent circumstances, and thus has not sustained its burden to justify the conduct of the officer under the Fourth Amendment or under Article I § 14. See, e.g., State v. Larocco, 794 P.2d 460 (Utah 1990)(warrantless search requires proof of exigent circumstances and probable cause under Article I § 14 of Utah Constitution); State v. Hodson, 866 P.2d 556, 560 (Utah App. 1993)(to justify warrantless body search, government must establish probable cause, exigent circumstances, and reasonable method of search), rev'd on other grounds, 907 P.2d 1155 (Utah 1995).

Because the officer's warrantless search violated the scope of detention and Article I § 14 and the Fourth Amendment, this Court should rule that all resultant evidence must be excluded. See Larocco, supra, (adopting exclusionary rule under state constitution); Wong Sun v. United States, 371 U.S. 471 (1963)(exclusionary rule applies to Fourth Amendment violation).

II. THE SCOPE OF QUESTIONING

In its summary of the argument the State argues that the officer was within bounds in asking if there were alcohol or marijuana in the car, because he saw a Crown Royal bag next to the driver, who had a prior DUI conviction, and green flakes in a cup holder. State's brief at 7.

Only later in its argument does the State acknowledge the true content and sequence of questions, wherein the officer asked if there was anything illegal in the car and received a negative response, wherein the officer then asked if there were any weapons or alcohol in the car and received a negative response, wherein the officer then asked if Lafond had any *marijuana in the car and received a negative response*, and wherein the officer then asked if anyone had smoked marijuana in the car recently, and received Lafond's answer that she did not think so, but did not know if anyone had because she had recently loaned the car to someone else for a week, and wherein the officer then asked if he could search the car and Lafond acquiesced (R. 127 at 7-8). See State's brief at 9-12.

While the State argues that the officer's questions were the most efficient and least

intrusive means of confirming or dispelling his suspicions, see id., his questioning should have stopped once Ms. Lafond told him that there was nothing illegal in her car. Nonetheless, the officer proceeded to ask if there was any alcohol, weapons or marijuana in her car, if anyone had smoked marijuana in her car recently, and if he could search her car (R. 127 at 9).

The generalized and redundant nature of the questions belie the notions that the officer was duty bound to investigate specific articulable suspicions, or was trying to conduct an expeditious investigation, and demonstrate instead that the officer was fishing around for anything to confirm his generalized hunches about Ms. Lafond.

Particularly after he received all of her answers reflecting that there was nothing unlawful or improper in her car, the officer had no reason to ask to search her car, and should have allowed her to proceed on her way. See, e.g., State v. Hansen, 2000 UT App 353, 17 P.3d 1135, cert. granted, 26 P.3d 35, 2001 Utah LEXIS 102 (recognizing that questioning violated proper scope of traffic stop), discussed at length in Lafond's opening brief.

The State argues that because Lafond did not seek suppression of any weapons, the Court should find that the officer's asking about weapons was harmless. State's brief at 9 n.1. The State cites no authority for this proposition, which is inconsistent with well-established law that if any officer asks questions which go beyond the original basis for the stop or are not supported by a reasonable, articulable suspicion, such questioning exceeds the scope of detention and violates the Fourth Amendment and Article I § 14. See, e.g., State v. Hansen, 2000 UT App 353, 17 P.3d 1135, cert. granted, 26 P.3d 35, 2001 Utah


LEXIS 102. The notion that a scope violation is rendered “harmless” if no contraband matching a question is found is also inconsistent with well-established law that the legality of a search does not turn on what the search turns up. See, e.g., State v. Ribe, 876 P.2d 403, 415 (Utah App. 1994)(“Picking possible justifications after the fact is an entirely unsatisfactory manner by which to decide whether evidence should be suppressed. ‘A search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from what is dug up subsequently.’”)(citations omitted).

This case does not call for this Court to assess the merits of United States v. Holt, 264 F.3d 1215, 1222-23 (10th Cir. 2001), cited in footnote 1 on page 9 of the State’s brief for the proposition that officers may ask about the presence of weapons during the course of traffic stops, absent particularized suspicion. This is so because Holt is expressly limited to officers asking about the presence of loaded weapons, and turns in part on the court’s opinion that the defendant’s privacy interests were diminished by an Oklahoma statute which requires people to inform the police if they are carrying concealed weapons pursuant to a permit. See Holt, 264 P.2d at 1222-23. Holt is thus inapposite to this case.

Conclusion

This Court should reverse the trial court’s order denying the motion to suppress, and remand this case to the trial court for withdrawal of Ms. Lafond’s conditional plea and dismissal.


DATED this 2 day of Aug, 2002.



HAPPY J. MORGAN
Counsel for Ms. Lafond


CERTIFICATE OF DELIVERY/MAILING

I hereby certify that I have caused to be served two true and correct copies of the foregoing to Assistant Utah Attorney General Joanne C. Slotnik, 160 East 300 South, 6th Floor, Salt Lake City, UT 84114-0854, this _____ day of Aug, 2002.



Happy Morgan
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I hereby certify that I hand-delivered/mailed, first class postage pre-paid, two true and correct copies of the foregoing to Assistant Utah Attorney General Joanne C. Slotnik, 160 East 300 South, 6th Floor, Salt Lake City, UT 84114-0854, this _____ day of Aug, 2002.



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